



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 7, 1996

Mr. Terry Trimble
Interim Commissioner
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR96-1831

Dear Mr. Trimble:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 100980.

The Texas Department of Human Services (the "department") received a request for "[t]he entire Texas Department of Human Services file on the Roseate, for the period September 1, 1992 through July 1, 1996, whether called Roseate Women's Shelter, The Roseate, A Better Choice Inc. d/b/a The Roseate or other similar name." You claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.103, 552.107, 552.110, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The department must meet both prongs of this test for information to be excepted under section 552.103(a).

¹We note that by letter dated September 4, 1996, the department withdrew a part of its request and stated that it plans to release John A. Braden & Company, P.C.'s response to the department's request for proposal. Therefore, we do not address that information in this ruling.

Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it--unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982). This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. Open Records Decision Nos. 555 (1990), 551 (1990). Based on the information submitted to this office, we cannot conclude that litigation is reasonably anticipated. Therefore, the department may not withhold the information for which it asserted an exception under section 552.103 from required public disclosure under that exception.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 51.007 of the Human Resources Code provides:

The department [of Human Services] may not disclose any information gained through reports, collected case data, or inspections that would identify a particular center or a person working at or receiving services at a family violence shelter center.

We agree that some of the submitted information falls within the protection of this statute. However, most of the information for which this exception is claimed does not appear to be "gained through reports, collected case data, or inspections." We have marked the information that the department must withhold under section 51.007 of the Human Resources Code as applied through section 552.101 of the Government Code. The department may not withhold the remainder of the submitted information under section 552.101.

You claim that federal law may prohibit disclosure of a social security number of a third party found within the requested information. The federal Social Security Act, 42 U.S.C. § 405 provides, in part:

[A]n agency of a State (or political subdivision thereof) charged with the administration of any general public assistance, driver's license, or motor vehicle registration law which did not use the social security account number for identification under a law or regulation adopted before January 1, 1975, may require an individual to disclose his or her social security number to such agency solely for the purpose of administering the laws referred to in clause (i) above and for the purpose of responding to requests for information from an agency

operating pursuant to the provisions of part A or D of subchapter IV of this chapter.

42 U.S.C. § 405(c)(2)(C)(vi). We believe that this federal law makes confidential the social security numbers obtained by the department, as the law makes no provision for the release of the requested social security numbers by a state agency. *See American Fed'n of State, County and Mun. Employees v. City of Albany*, 725 P.2d 381 (Or. App. 1986) (noting that this provision may prohibit further disclosure of social security numbers acquired under its authority). Therefore, we conclude that the department must withhold the social security number found within the submitted information.

Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. We have reviewed the submitted information that the department claims is excepted from disclosure by section 552.107(1) and conclude that some of it is excepted from disclosure by this section. We have marked the information that the department may withhold under section 552.107(1).

Section 552.110 excepts from disclosure a trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. You state that releasing responses to a request for proposal may implicate the property interests of the bidders. Consequently, pursuant to section 552.305 of the Government Code, this office informed the bidders of the requests and of their obligation to submit arguments as to why their bids are excepted from disclosure. None of the bidders responded. Therefore, the department may not withhold the requested bids from required public disclosure.

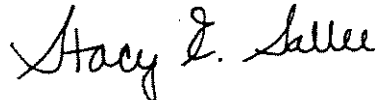
Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. We have reviewed the group of non-draft documents for which the department has claimed section 552.111 and

conclude that they relate to the policymaking processes of the department. Therefore, the department may withhold the hand-written portions of those documents under section 552.111, as they reflect advice, opinion, or recommendation.

Section 552.111 also excepts from required public disclosure a preliminary draft of a letter or document related to policymaking matters, as drafts represent the advice, opinion, and recommendation of the drafter as to the form and content of the final document. Open Records Decision No. 559 (1990). We have reviewed the draft documents at issue and conclude that they relate to the policymaking processes of the governmental body. Therefore, the draft documents may be withheld from disclosure under section 552.111.²

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/ch

Ref.: ID# 100980

Enclosures: Marked documents

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²It appears that one of the documents grouped together with the draft documents is not a draft. We have reviewed the document and marked the information that may be withheld under section 552.111. The remainder of that document may not be withheld under section 552.111.

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